



## The Elephant in the Room

# The Ethics of Discovering an Impaired Lawyer in Your Firm

By Joanna L. Storey and Cassidy E. Chivers

Law firms are faced with difficult choices when management discovers that an attorney within the firm is mentally impaired. Regardless of the reason for the impairment (dementia, depression, drugs, alcohol, among other things), management would be unwise to bury their heads in the sand and hope that things get better on their own. Not only does the impaired attorney need help, but the firm must consider a host of obligations triggered by the attorney's impairment.

While some firms adopt a "cross that bridge when we come to it" approach, best practice is to have a game plan already in place to facilitate the process and to avoid a rushed need to research the firm's obligations. As a threshold matter, "steps must be taken that are designed to give reasonable assurance that such impairment of a lawyer will not result in breaches of" the rules of professional conduct that govern. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-429, at 1 (2003). With the caveat that no one size fits all approach will work, consider the following when developing your firm's strategy for addressing the ethics of an impaired lawyer.

**Know the applicable rules.** The plan's foundation should be the governing rules of professional conduct. For example, Model Rule 5.1 requires partners and management to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Supervising attorneys must also assure that their subordinates are following the rules.

Thus, management's suspicion that a firm attorney is impaired triggers an obligation to scrutinize that attorney's work closely. *See* Formal Op. 03-429, at 4. Consider also Model Rule 1.16(a)(2), which provides that a lawyer shall not represent a client if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." Depending on the facts and circumstances, an attorney's mental illness may not rise to the level of materially impairing his or her ability to lawyer. As depression becomes less stigmatized, it is understood that many people who struggle with mental health conditions are fully functional and can effectively do their jobs while under treatment. On the other hand, some attorneys with mental illness are so impaired that rule violations are inevitable. This leads to step two.

**Talk with the impaired attorney.** Have a frank discussion with the potentially impaired attorney and those who work closely with the attorney. Absent reasonable assurances that the attorney's ability to represent firm clients effectively is not limited, insist that the attorney immediately seek help from the nearest lawyer's assistance program.

**Consider accommodations.** Attorneys who suffer from mental illness may be protected from discrimination by the Americans with Disabilities Act (ADA). The trick for firms is what to do if the attorney's mental impairment materially affects his or her representation of firm clients. For instance, "[a] lawyer who, because of his mental impairment is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the Model Rules if he can work in an unpressured environment." Formal Op. 03-429, at 4. Thus, if the stress of litigation deadlines sparks the attorney's impairment, consider transferring the attorney to less stressful practice area. If the effect of the impairment cannot be resolved with accommodations, it may be time to consult with a knowledgeable ADA attorney.

**Determine whether the impaired attorney violated any rules.** Consider completing an internal audit of the matters that the attorney handled while impaired. Management should be mindful that a rule violation may trigger the need for disclosure to the client. Model Rule

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8.3 also requires management or a supervising attorney to report ethics rules violations that raise a substantial question about the violator's honesty, trustworthiness, or fitness as a lawyer, under certain circumstances.

*Disclose material errors to current clients.* Model Rule 1.4 requires attorneys to keep clients "reasonably informed about the status of the matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Formal Opinion 481 (2018) addresses a lawyer's duty to inform a current client of the lawyer's material error. If the firm's internal audit reflects that the impaired lawyer made a material error in one or more matters, the firm should evaluate whether the applicable rules in the jurisdiction require disclosure to current (or former) clients.

*Be mindful of the impaired lawyer's privacy rights.* One of the most difficult tasks may be balancing the nature and extent of disclosure with the privacy rights of the impaired lawyer. As noted by Formal Opinion 03-429,

Rule 1.4 requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel. In doing so, the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation.

*Integrate mental health training into your professional development.* Some state bars require at least one hour of CLE credit in mental health or substance abuse per term. But attorneys often procrastinate, fulfilling that credit just before the reporting deadline, without giving much thought to understanding the goals of the training. Consider offering a mindfulness seminar every year for all firm attorneys with a strong incentive to attend (*e.g.*, reduction of billable hour requirements). Follow up with quarterly emails encouraging attorneys to set aside "me time" so that they will truly feel refreshed before work and life stress overwhelm them.

The key takeaway is to formulate a plan to prevent rule violations in the first place, as suggested by Formal Opinion 03-429, at 4:

If reasonable efforts have been made to institute procedures designed to assure compliance with the Model Rules, neither the partners in the firm nor the lawyer with direct supervisory authority are responsible for the impaired lawyer's violation of the rules unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action. 